

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HARVEY HOLLAND,

Defendant,

v.

UNITED STATES OF AMERICA,

Plaintiff.

1:CR-01-195-06

**FILED
HARRISBURG**

JAN 29 2007

MARY E. D'ANDREA, CLERK
Per *[Signature]*
DEPUTY CLERK

BLAKELY APPLIES RETROACTIVELY

NOW COMES Harvey Holland seeking permission to initiate appellate review of the district court's order filed December 5, 2005, denying motion to correct sentence pursuant to 28 U.S.C. §2255. Hence this court should limit its examination to a threshold inquiry into the underlying merit of the claim rather than ruling on the merit. Miller-El v. Cockrell, 153 L.Ed.2d 931.

Hereinbelow defendant proceeds to demonstrate a substantial showing of the denial of a constitutional right. Thus defendant can satisfy this standard by demonstrating that jurists of reason could (1) disagree with the district court's resolution of his constitutional claims or (2) conclude the issues presented herein are adequate to deserve encouragement to proceed further.

In a habeas corpus proceeding in which the detention complained of arises out of process by a court an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issue a certificate of appealability pursuant to §2253(c) of Title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not be issued.

The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. See Hunter v. U.S., 101 F.3d 1565.

BACKGROUND

Defendant was convicted following jury trial of distribution and possession with intent to distribute fifty grams or more of crack cocaine in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 and conspiracy to distribute and possess with intent to distribute fifty grams or more of crack cocaine. His conviction and sentence were affirmed by the Third Circuit Court of Appeals and soon after the Supreme Court denied his petition for writ of certiorari on January 12, 2004.

Defendant filed the instant motion to correct judgment and sentence pursuant to 28 U.S.C. §2255 ¶6(3). Defendant argued that his sentence violated the dictates of Blakely v. Washington, 124 S.Ct. 2531 (2004).

THRESHOLD QUESTION

The threshold question presented herein is whether existing precedent in this circuit answer whether the rule announced in Blakely/Booker applies retroactively?

DISCUSSION

The Supreme Court has not yet stated whether the rule announced in Blakely and Booker applies retroactively to cases on collateral review. The lower court decisions that the court was reviewing were direct appeals. Discussion of retroactivity would have been gratuitous and was not briefed. Consequently, no inference can be drawn from the court's failure to discuss that issue. In ascertaining whether Booker applies retroactively the first step is to clarify what rule the court announced a process complicated here by the unusual alignment of justices the remedy endorsed by five members of the court (which made the sentencing guidelines advisory) must not be confused with the constitutional violation at issue. The constitutional violation was the enhancement of a sentence above the statutory maximum based upon facts neither admitted by the

defendant nor found by a jury to be true beyond a reasonable doubt. The step in analyzing retroactivity is to determine whether Blakely and Booker announced a new rule. A case announces a new rule if the result was not dictated by precedent existing at the time the defendant conviction became final. See Teague v. Lane, 489 U.S. 288, 301 (1989).

Defendant's conviction was final in January 12, 2004, way after the decision in Apprendi v. New Jersey, 530 U.S. 466 (2000) although Blakely and Booker are extensions of Apprendi the latter's application to the federal sentencing guidelines was not dictated by Apprendi.

Prior to Blakely every circuit that considered the question concluded that Apprendi did not apply to federal sentencing guidelines. See United States v. Hernandez Guardado, 228 F.3d 1017. Whether Booker was dictated by Blakely presents a closer question.

Defendant's conviction became final before either Booker or Blakely was announced. Even if Booker were dictated by Blakely; it would still constitute a new rule so far as defendant is concerned. The next step is to decide whether the new rule is substantive or procedural. A rule is substantive for the present purpose if it alters the range of conduct or the class of persons the law punishes. Rules that regulate only the manner of determining the defendant's culpability are procedural. See Schriro v. Summerlin, 124 S.Ct. 2519 (2004) applying this definition the rule announced in Blakely and Booker is procedural.

New substantive rules generally apply retroactively because they necessarily carry a significant risk that a defendant stands convicted or an act that the law does not make criminal "or faces a punishment the law cannot impose upon him." *Id.* at 2522-23. New rules of procedure generally are not retroactive they merely raise the possibility that some one convicted with use of the invalidated procedure might have been acquitted otherwise.

Because of this more speculative connection to innocence retroactive effect is given to only a small set of watershed rules of criminal procedure implicating the

fundamental fairness and accuracy of the criminal proceeding. Id. at 2523. (citations omitted). It is a prime instrument for reducing the risk of convictions resting on factual error. The reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. See Ivan V. v. City of New York, 407 U.S. 203, 205 (1972)(purpose of reasonable doubt standard is to overcome an aspect of a criminal trial that substantially impairs the truth finding function and Winship is thus to be given complete retroactive effect). Hankerson v. North Carolina, 432 U.S. 233 giving retroactive effect to rule requiring proof of all elements of crime beyond a reasonable doubt and voiding presumptions that shift burden of proof to defendant.

Winship, Ivan V, and Hankerson predate the retroactivity standard announced in Teague. Those decisions also concerned the validity of the underlying conviction rather than a sentence enhancement. On the other hand at least five justices have said that sentence enhancements are of sufficient importance to warrant application of the reasonable doubt standard in some instances. See Apprendi, Blakely and Booker supra. Given this history this court cannot exclude the possibility that the Supreme Court might apply Blakely retroactively in some situations.

DEFENDANT IS ENTITLED TO RELIEF

Under the standard first articulated in Teague the only apparent justification for retroactive application of Blakely/Booker would be to redress potential miscarriages of justice resulting from an inaccurate fact finding procedure. See Exhibit A, where defense counsel objection is to the probation officer use of the murder of Jason Harrigan in calculating the guidelines. Because defense counsel actually disputed the facts that resulted in the sentence enhancements and the court decided the matter against him using the wrong standard of proof, he is entitled to relief because the government sought the court to use the preponderance of the evidence standard in order to conclude its mandatory to impose additional point level adjustments which also qualified through relevant

conduct find at U.S.S.G. 1B1.3(A)(1)(a) applicable to both counts two and five. Where it further applied a total offense level of "forty-three" (43) criminal history category of VI which resulted in a guideline sentence of life imprisonment at (zone D) based on U.S.S.G. chapter 5 part A pursuant to 2K2.4. See Exhibit B where the government further advised the court the fact that the jury was unable to reach a verdict on the court charging the defendant with murder does not preclude the conduct from being considered by this ruling is totally in opposite with Supreme Court's Booker finding (unconstitutional).

CERTIFICATE OF APPEALABILITY SHOULD BE ISSUED

The next question is whether certificate of appealability should be issued in this case. Congress has provided that a certificate of appealability may be issue "only if the applicant has made a substantial showing of denial of a constitutional right." 28 U.S.C. §2253(c)(2). The constitutional violation at issue herein is the enhancement of a sentence above the "statutory maximum" based upon facts neither admitted by the defendant nor found by a jury to be true beyond a reasonable doubt.

In the instant case the district court denied defendant motion on procedural grounds. However in *Slack* the Supreme Court held that when the district court denies a habeas petition on procedural grounds with out reaching the prisoners underlying constitutional claim, a certificate of appealability should be issued when the prisoner shows "like here" at least that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. ***Slack***, 529 U.S. at 484. The United States Supreme Court has recognized a new right through *Blakely/Booker* and defendant has filed his claim based upon that right within the one year limitation period of 28 U.S.C. §2255 ¶6(3). As a result the claim is timely and appropriate filed.

Hence it should be noted that the district court established defendant "life sentence" under the mandatory sentencing guidelines that the Supreme Court declared

unconstitutional.

The Supreme Court in Booker severed and excised the provisions of the federal sentencing statute that made the guidelines mandatory. See Booker as modified the federal Sentencing Reform Act of 1984 makes the guidelines effectively advisory a dramatic change from the past 18 years. The Booker rule then is that the binding federal guideline system is unconstitutional. That means defendant who was sentenced under that binding system was unconstitutionally sentenced. To be constitutional the sentence would have had to recognize that the guidelines were "advisory" only. The district court in this case considered the guidelines mandatory. Thus it cannot be said that defendant claim regarding enhancing his sentence above the statutory maximum based upon facts neither admitted by him nor found by a jury to be true beyond a reasonable doubt is not debatable among jurists of reason.

Therefore as the record fully and properly reflect sufficient indicia warranting objections which under ordinary prudential doctrines and standard will cause said illegal enhancement errors to be preserved especially where they were also argued in the district court. Movant seek this court to render sentence unconstitutional and appoint counsel so that the matter could be fully presented to the court for consideration of movant appeal by applying Blakely retroactively to defendant's case.

Respectfully submitted,

By: Harley Holland
 Harley Holland, pro se
 Reg. No. EP8162
 SCI Dallas
 1000 Follies Road
 Dallas, PA 18612

CERTIFICATE OF SERVICE

I Harvey Holland hereby certify that a true and accurate copy of the foregoing notice of appeal and incorporated attached application for certificate of appealability has been served on all interested person via U.S. mail postage prepaid to ensure the delivery of same as follows:

William A. Behe (A.U.S.A.)
Federal Building 228 Walnut Street
Harrisburg, PA 17108

Harvey Holland

Harvey Holland, pro se
Reg. No. EP8162
SCI Dallas
1000 Follies Road
Dallas, PA 18612

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : 1:01-CR-195-06
 HARVEY HOLLAND, :
 Defendant :

TRANSCRIPT OF PROCEEDINGS

SENTENCING

BEFORE: HON. WILLIAM W. CALDWELL, Judge

DATE: November 20, 2002

PLACE: Courtroom Number Three
Federal Building
Harrisburg, Pennsylvania

COUNSEL PRESENT:

WILLIAM A. BEHE, Assistant United State Attorney
For - United States of America

DENNIS E. BOYLE, Esquire
For - Defendant

Vicki L. Fox, RMR
Official Reporter

Holland - Sentencing

1 THE COURT: Good morning.

2 MR. BEHE: Good morning, Your Honor. The next
3 matter before you is that of the United States of America vs.
4 Harvey Holland which is at Criminal Docket Number 01-195-06.
5 Mr. Holland is present in court with counsel Mr. Boyle.

6 This is the time and place set by the Court for
7 sentencing in this matter. There has been a presentence
8 investigation report that has been prepared, an objection
9 filed by Mr. Boyle and an addendum prepared by Mr. Vought of
10 the Probation Office addressing the same.

11 We are prepared to proceed at this time.

12 THE COURT: All right. We will address first the
13 objections to the presentence report. Mr. Boyle?

14 MR. BOYLE: Your Honor, my primary objection to
15 the presentence report concerns the inclusion of the homicide
16 or the death of Jason Harrigan into the sentencing
17 calculations.

18 As the Court is aware, the jury was unable to come
19 to a verdict with respect to that death and whether or not it
20 was a homicide. We don't exactly know why that was. But
21 subsequently, the jury was unable to determine guilt, and the
22 government subsequently dismissed that count of the
23 indictment.

24 I understand, Your Honor, that the Court is free
25 in its discretion viewing the evidence to make a

Holland - Sentencing

1 determination as to whether or not by a preponderance of the
2 evidence that Mr. Holland was involved in the homicide.
3 However, we believe the evidence shows that he was not, Your
4 Honor.

5 We believe this evidence shows that Mr. Harvey
6 Holland was at most a passer, a rider along or somebody who
7 traveled with his brother. Obviously, he did use crack
8 cocaine from time to time, but we don't think there is any
9 evidence or sufficient evidence to prove by a preponderance
10 of the evidence that he engaged in this homicide.

11 We further believe, Your Honor, that this homicide
12 was not -- the evidence would indicate this homicide was not
13 drug related in any event. If in fact Jeffrey Holland was
14 involved in the homicide, it appears as though he may have
15 had motives other than drug use.

16 For example as I recall the evidence, he was
17 offended by this other drug dealer. This other drug dealer
18 had threatened him and had embarrassed him out on the
19 street.

20 Therefore, we believe that if Jeffrey Holland was
21 involved in the homicide, it was as a result of personal
22 feelings or personal emotions as opposed to drug trafficking
23 itself. But further than that, we don't think there is
24 sufficient evidence to connect Harvey Holland to the
25 homicide.

Holland - Sentencing

1 THE COURT: All right. Mr. Behe, do you wish to
2 respond?

3 MR. BEHE: Yes, Your Honor. I believe that the
4 evidence in this matter that was presented to the jury far
5 surpassed the preponderance of the evidence standard. I
6 think it was proved beyond a reasonable doubt that
7 Mr. Holland, Mr. Anderson and Jeffrey Holland were involved
8 in the ambush murder of Jason Harrigan.

9 Juries do what they do and decide what they decide
10 and don't decide what they don't decide. I always accept
11 their decisions or lack of decisions. But regardless of
12 that, at this point, [Your Honor is uniquely in a position to
13 [decide whether or not the evidence was sufficient to include
14 [the homicide as part of a sentencing factor having witnessed
15 or observed all of the witnesses that the United States
16 [presented in this particular case.

17 The evidence, as Your Honor concluded at the
18 Jeffrey Holland sentencing, was compelling with regards to
19 the involvement of these individuals in that murder.
20 Numerous individuals testified as to admissions made by one,
21 all or some of the participants in this conspiracy to
22 participating in this homicide, explaining through the
23 admissions made by the various participants details that only
24 those who participated in the killing could have known.

25 The physical evidence at the scene belies any

Holland - Sentencing

1 claim that Mr. Holland was not a participant. There were
2 three different shell casings from three different caliber
3 weapons which the expert from the Pennsylvania State Police
4 testified would have had to come from three different guns.

5 Evidence presented through the testimony of
6 witnesses who knew of these conspirators placed guns of the
7 same caliber in their hands at various times during the drug
8 trafficking conspiracy. The jury concluded that Mr. Holland
9 was a coconspirator by its verdict in this case. The amount
10 of crack cocaine was as the Probation Department determined.*

11 I really think there is no colorable argument that
12 this was not a drug related killing as Your Honor so
13 concluded in the Jeffrey Holland sentencing. There were
14 admissions made by Mr. Holland that Harrigan was messing --

15 THE COURT: Which Mr. Holland?

16 MR. BEHE: Jeffrey Holland. Sorry, by Jeffrey
17 Holland that Mr. Harrigan was messing with the drug
18 business. Those were statements made to Toyann Anderson.
19 There were statements made my Harvey Holland that he had just
20 come from Camelot Village where he shot someone. As I said,
21 I think the evidence was compelling that this was a drug
22 related killing and that Mr. Harvey Holland was an equal
23 participant in this killing as well, and that that
24 enhancement should apply.

25 THE COURT: What quantity of crack cocaine did we

Holland - Sentencing

1 talk about in this case?

2 MR. BEHE: The jury returned a verdict that it was
3 in excess of fifty grams. That would place this at a
4 mandatory ten to life absent anything else But the quantity
5 of crack cocaine from the various witnesses places it
6 conservatively at at least one half of a kilogram up to a
7 kilogram and a half of crack cocaine that was involved in the
8 conspiracy.

9 THE COURT: That would be what?

10 MR. BEHE: Five hundred grams to one and a half
11 kilograms.

12 THE COURT: Mr. Boyle, do you want to respond to
13 anything that Mr. Behe just said?

14 MR. BOYLE: Yes. Of course, my recollection of
15 *the evidence may be faulty, and I will certainly rely upon *
16 *the Court's,* I don't recall any admissions made by Harvey
17 Holland with respect to the homicide. I remember a number of
18 admissions made by Jeffrey Holland. However, I don't
19 remember any specific admissions by Harvey Holland.

20 MR. BEHE: Just referring to the presentence
21 investigation report, the information that is contained under
22 the relevant conduct section has that there was in paragraph
23 17, Angela Jackson was interviewed and testified in court
24 Harvey Holland showed up to meet her on one occasion. When
25 he was late, she asked where he was. He said I was taking

Holland - Sentencing

1 talk about in this case?

2 MR. BEHE: The jury returned a verdict that it was
3 in excess of fifty grams. That would place this at a
4 mandatory ten to life absent anything else. But the quantity
5 of crack cocaine from the various witnesses places it
6 conservatively at at least one half of a kilogram up to a
7 kilogram and a half of crack cocaine that was involved in the
8 conspiracy.

9 THE COURT: That would be what?

10 MR. BEHE: Five hundred grams to one and a half
11 kilograms.

12 THE COURT: Mr. Boyle, do you want to respond to
13 anything that Mr. Behe just said?

14 MR. BOYLE: Yes. Of course, my recollection of
15 *the evidence may be faulty,* and I will certainly rely upon,*
16 *the Court's,* I don't recall any admissions made by Harvey
17 Holland with respect to the homicide. I remember a number of
18 admissions made by Jeffrey Holland. However, I don't
19 remember any specific admissions by Harvey Holland.

20 MR. BEHE: Just referring to the presentence
21 investigation report, the information that is contained under
22 the relevant conduct section has that there was in paragraph
23 17, Angela Jackson was interviewed and testified in court
24 Harvey Holland showed up to meet her on one occasion. When
25 he was late, she asked where he was. He said I was taking

Holland - Sentencing

1 care of business out at Camelot Village. She questioned him
2 further, and he told her that he had killed someone.

3 There was other admissions made by the
4 coconspirators as to who the participants were. These were
5 statements that we suggest are reliable and can be considered
6 by the Court, along with the physical evidence at the scene.

7 THE COURT: I had the unique advantage I guess of
8 hearing all of the evidence in this case. Normally that
9 doesn't happen, particularly when you are dealing with guilty
10 pleas. But I heard and saw and observed all of the witnesses
11 in this case.

12 I frankly could not understand in any way how the
13 jury failed to return a guilty verdict because in my mind,
14 the evidence against all three of the people who were
15 involved in this was compelling.

16 As I did in the Jeffrey Holland case, I am going
17 to just briefly outline the evidence that is directly related
18 to Harvey Holland. But I also note, as Mr. Behe has, that
19 many of the things that Jeffrey Holland said to other people
20 or did as a conspirator are admissible and can be considered
21 against Harvey. And I am not going to outline all of that
22 evidence.

23 Anthony Braxton in paragraph seven of the
24 presentence report, and I recall it from the trial, indicated
25 that the defendant and his brother bragged about shooting an

Holland - Sentencing

1 individual named Stewart who apparently was shot in a phone
2 booth near the time when this killing occurred. I am not
3 saying that that is evidence that either of the gentlemen
4 were involved in shooting Harrigan, but I think it is
5 evidence that can be considered with all of the other
6 evidence as to whether or not Mr. Harvey Holland was involved
7 in this killing.

8 Mark Hughes testified that the defendant and his
9 brother Jeffrey sold crack since 1986, and that he went to
10 New York City to buy crack. Sometime in the winter of 2000,
11 Mr. Hughes said that the defendant and his brother robbed and
12 shot another dealer. I don't know if that would be Stewart
13 or not. Mr. Behe, do you know who that was?

14 MR. BEHE: I believe that was supposed to have
15 been Ernie Stewart.

16 THE COURT: I think Mr. Hughes indicated that he
17 observed the defendant in the car -- in a car at one time
18 with a weapon, and that he was always in possession of a
19 weapon and told Mr. Hughes about the shooting of Mr. Stewart
20 in the phone booth.

21 Jamine Jackson said that the defendant was a
22 violent person with a reputation as an enforcer. Sharonda
23 Posey testified she traveled to New York with the defendant
24 to get drugs. Angela Jackson, as Mr. Behe has indicated,
25 testified that he admitted at one time or told her at one

Holland - Sentencing

1 time that he was taking care of business in Camelot Village
2 and admitted that he had killed someone.

3 Toyann Anderson said that the defendant implicated
4 himself in the murder with Shawn Anderson and Jeffrey
5 Holland. I think I have that correct.

6 MR. BEHE: Yes, sir.

7 THE COURT: Anthony Jackson said that Jeffrey
8 implicated the defendant Harvey and Shawn, and that Harvey
9 admitted to Jackson that he and Jeffrey shot Harrigan.

10 Sharonda Posey said that the defendant Jeffrey
11 Holland and Shawn Anderson were excited waiting for a TV news
12 report of Mr. Harrigan's death, and that when it came on,
13 things were said like here it is and that nigger is dead, and
14 he got what he deserved, things of that kind.

15 Jeffrey later told Sharonda Posey that he and
16 Harvey and Anderson did it. And Anderson I think also
17 admitted to killing to Sharonda Posey. Ezerell Bynum, the
18 three of them told him that they killed Harrigan. Jeffrey
19 told him that they cut a hole in a gate or a fence and waited
20 to ambush the victim. And, of course, there was evidence to
21 that effect. I thought that was significant because how else
22 would Mr. Bynum have that information?

23 Aaron Pitts, another witness, testified that
24 Jeffrey told him why and how he and others used three
25 different guns to kill Harrigan. And, of course, that

Holland - Sentencing

1 evidence of the use of three weapons Mr. Behe has alluded
2 to.

3 Omar Dykes, who did not testify, told agents that
4 Jeffrey admitted to him that the three people involved here
5 did that -- did the killing, and that the defendant told
6 Dykes to tell Jeffrey not to run his mouth about the
7 killing.

8 I think all of these facts when put together more
9 than persuade me beyond a reasonable doubt, certainly by a
10 preponderance of the evidence that Harvey Holland was a
11 participant in drug dealing, and that he and his brother
12 conspired with Anderson and agreed to seek revenge or
13 whatever it was against Mr. Harrigan.

14 I think it is true that Jeffrey Holland was the
15 boss of this conspiracy so to speak, but all of the
16 conspirators were involved in this killing. I have no
17 trouble coming to the conclusion that this relevant conduct
18 must be considered in imposing sentence.

19 All right. Will you have Mr. Holland come up,
20 please? Mr. Holland, before sentence is imposed, do you have
21 anything that you would like to say this morning concerning
22 the matter of sentencing?

23 THE DEFENDANT: Yes. As far as Jason Harrigan, I
24 do not know that young man. I got kids of my own that is
25 about that young man's age. I wasn't no more than a crack

Holland - Sentencing

1 user. They're trying to make me out to be something like a
2 big drug dealer. And in looking at my record and my
3 background, it shows that I was no more than an actual crack
4 user, a person that goes out and does burglaries and commits
5 other offenses like writing checks. That is not an offense
6 of a drug dealer, of the type of person who is actually
7 bringing drugs into the state of Pennsylvania.

8 Looking at my jacket, I got ten counts of
9 burglaries that I actually got locked up for and presently,
10 recently checks. Looking at my jacket, that is what it shows
11 is a person who has got a problem.

12 I never laid eyes on Mr. Harrigan. I never had a
13 problem with Mr. Harrigan. As far as anyone saying I killed
14 that man, I got a son that is 22 years old and a daughter
15 that's 19 years old. As far as me being out there being in
16 the type of life that my brother was living in, I was trying
17 to tell him not to sell drugs. He choose to steal drugs. I
18 was a user. It made my activities for me to go out and break
19 into people's stuff and write checks.

20 As far as me per se participating in any of this,
21 I am not guilty of that.

22 THE COURT: The jury found you --

23 THE DEFENDANT: The jury never heard all of the
24 evidence. Where's the evidence that put me with this? A lot
25 of there times when they say I was selling drugs, I --

Holland - Sentencing

1 THE COURT: We are past that point, Mr. Holland.
2 Certainly, based upon your past criminal record, it's not
3 difficult for me to believe that you were participating with
4 your brother and Anderson in drug distribution in this
5 community.

6 Do you have anything further you want to say,
7 Mr. Boyle?

8 MR. BOYLE: Your Honor, I understand we are facing
9 a mandatory minimum sentence here of life. In view of that,
10 I believe I have already said everything that can be said in
11 the case.

12 THE COURT: Mr. Behe, do you wish to say anything
13 further?

14 MR. BEHE: No, Your Honor.

15 THE COURT: Pursuant to the Sentencing Reform Act
16 of 1984, it is the judgment of the Court that the defendant
17 Harvey Holland is hereby committed to the custody of the
18 Bureau of Prisons to be imprisoned for a term of life.

19 This term consists of terms of life on each of
20 Counts 2 and 5 to be served concurrently with each other and
21 consecutive to the sentences imposed in the Dauphin County
22 Court to numbers 3221-00, 3222-00 and 1964-01, 1971-01, and
23 1963-01.

24 We find that the defendant will have some ability
25 to pay a fine. Accordingly, we order that he pay the United

Holland - Sentencing

1 States the sum of \$4200.00 consisting of a fine of \$2,000.00
2 and a special assessment of \$100.00 on each count.

3 The fine and special assessment shall be paid
4 through the Clerk of Court, are due in full immediately and
5 are payable during the period of incarceration. If for some
6 unforeseen circumstances the defendant is released from
7 prison, he shall be placed on supervised release for a term
8 of five years consisting of terms of five years on each of
9 Counts 2 and 5 to be served concurrently.

10 If released from custody of the Bureau of Prisons,
11 the defendant shall report in person within three days to the
12 Probation Office in the district to which he is released.
13 And while on supervised release, he shall comply with the
14 standard conditions that have been adopted by this Court.

15 Mr. Holland, I take no pleasure in imposing a
16 sentence like this, but this is a sentence that is clearly
17 called for under the law.

18 I now want to advise you that you do have a right
19 to appeal your sentence to the United States Court of
20 Appeals. If you are unable to pay the cost of an appeal you
21 may apply for leave to appeal inform a pauperis. If approved,
22 counsel will be appointed for you, and you will not be
23 required to pay any cost. Any such appeal must be filed
24 within ten days of today's date.

25 Do you understand that right of appeal,

Holland - Sentencing

1 Mr. Holland?

2 THE DEFENDANT: Yes, sir, Your Honor.

3 THE COURT: We are going to dismiss the original
4 indictment and the superseding indictment.

5 MR. BEHE: Yes, sir.

6 THE COURT: Is there anything else to be
7 dismissed?

8 MR. BEHE: No, Your Honor.

9 THE COURT: Is there anything further?

10 MR. BEHE: Not in this case, Your Honor.

11 THE COURT: Thank you.

12 THE DEFENDANT: Can I appeal this? You said I can
13 appeal in ten days; right?

14 THE COURT: Mr. Boyle will talk to you about
15 that.

16 MR. BOYLE: We have talked about that, Your Honor.

17 THE COURT: You will file an appeal. I think that
18 the case should be appealed so that someone else can look at
19 it and pass judgment on it.

20 MR. BOYLE: Thank you, Your Honor.

21 THE DEFENDANT: Thank you, Your Honor.

22

23

24

25

1 I hereby certify that the proceedings and evidence
2 are contained fully and accurately in the notes taken by me
3 on the trial of the above cause, and that this copy is a
4 correct transcript of the same.

5
6 Vicki L. Fox, RMR

7 Vicki L. Fox, RMR

8 Official Reporter
9

10 The foregoing certification of this transcript
11 does not apply to any reproduction by any means unless under
12 the direct control and/or supervision of the certifying
13 reporter.
14
15
16
17
18
19
20
21
22
23
24
25

ADDENDUM TO THE PRESENTENCE REPORT

United States District Court For The Middle District of Pennsylvania
United States v. Jeffrey Holland, Dkt. No. 1:CR-01-192-02

OBJECTIONS

By the Government

None.

By the Defendant

Defense counsel's only objection (attached) is to the probation officer's use of the murder of Jason Harrigan in calculating the guidelines.

In summary, counsel says that no weapons were ever recovered, there was no physical evidence linking the defendant to the shooting and the jury was unable to reach a verdict on the count charging the defendant with homicide. Counsel notes that there were individuals other than Mr. Holland and his coconspirators who had previous disagreements with Jason Harrigan. The defendant offers that investigative reports disclose that a resident of Camelot Village saw an unidentified white man running from the area immediately after the shots were heard. He notes that a taxi driver reported that she saw two black males in their early twenties in the vicinity of Camelot Village after the murder, they flagged her down, and she noticed that one of them was holding something in the front pouch of his sweatshirt. Counsel notes that with the exception of Toyann Anderson, the witnesses who implicated Mr. Holland in the homicide had extensive criminal backgrounds, were incarcerated at the time of their testimony, and had plea agreements with the Government which could substantially reduce their potential sentence in pending prosecutions against them. Counsel submits that even if the testimony from the various witnesses is somehow deemed sufficient to establish Mr. Holland's involvement in the killing by a preponderance of the evidence, it must further be established that the killing was carried out in furtherance of the drug conspiracy. Counsel believes that if the killing was done for some personal motive or some other disagreement, it would not comprise relevant conduct for purposes of sentencing. Counsel submits that there is very little evidence regarding the reason for the homicide and that the evidence proffered, specifically that of Toyann Anderson, is not sufficient to establish the homicide as one carried out in furtherance of the drug conspiracy.

The probation officer stands by the presentence report and trial testimony and witness interviews which consistently reveal that Mr. Holland, Harvey Holland and Shawn Anderson, by a preponderance of the evidence, killed Jason Harrigan. The fact that the jury was unable to reach a verdict on the count charging the defendant with homicide does not preclude the conduct from being considered by the Court for sentencing as it is relevant conduct under USSG § 1B1.3(a)(1)(A). The evidence seems convincing that Mr. Holland and the others killed Mr. Harrigan. Nine individuals either testified or told agents of conversations they had with Mr. Holland and/or Harvey Holland and Shawn

Anderson concerning their involvement in the murder. These individuals link the killing with drug trafficking and the drug conspiracy. The killing took place during the time frame charged in the drug conspiracy count (V). Toyann Anderson testified that she pointedly asked Mr. Holland and Shawn Anderson if they had done the shooting, to which they replied affirmatively and reiterated, "Yeah, we had to take care of that nigger because he was talking about getting our profits." Ms. Anderson said that the "profits" were from drug sales. Anthony Braxton told investigators that Holland had an ongoing dispute with another drug dealer from New York known as "J" (Harrigan). Ezerrell Bynum told investigators that Jeffrey Holland related to him how he had tried to work out an arrangement with Jason Harrigan regarding the sale of drugs and the sharing of assets in business. Bynum recalled Holland telling him that Harrigan essentially told him that he wanted no part of it. Omar Dykes told investigators that he recalled Holland telling him that he had a falling out with Harrigan over a drug debt.

Should the Court find for the defendant, the guidelines would be calculated pursuant to USSG § 2D1.1 and result in a base offense level of thirty-eight because the amount of crack cocaine is one and one-half kilograms or more. Toyann Anderson recalled that for several months until October 2000, she saw Mr. Holland and Shawn Anderson cut large pieces of crack cocaine into smaller pieces for resale on at least twelve occasions and estimated that they would package several ounces of crack cocaine at a time. At least three ounces of crack cocaine on each of twelve occasions equals 1,020.60 grams.

- *Jody Covington was in New York in January 2001 with the defendant and others when they bought a "baseball size" quantity of crack cocaine.
- *Mark Hughes testified that he went to New York with the defendant three times to get crack cocaine. He said that on each of two occasions the defendant got one-half kilogram quantities of crack, and on the last occasion bought four ounces for a total of approximately 1,113.4 grams.
- *The testimony of Wayne Williams alone establishes the defendant's involvement with one and one-half kilograms or more. He said that he helped the defendant and Shawn Anderson bag up crack cocaine between fifteen and twenty times and recalled that they bagged about seven ounces each time. Seven ounces on at least fifteen occasions equals 2,976.75 grams.

Adding two levels for obstruction of justice would result in a total offense level of forty and a guideline range of 360 months - Life imprisonment.

RESPECTFULLY SUBMITTED,

John K. Vought
John K. Vought

Senior U.S. Probation Officer

Approved:

Edward J. Kosheba 9/27/02
Edward J. Kosheba Date
Deputy Chief U.S. Probation Officer

TURNER AND O'CONNELL

ATTORNEYS AT LAW

4415 NORTH FRONT STREET

HARRISBURG, PA 17110

JAMES H. TURNER
TIMOTHY J. O'CONNELL

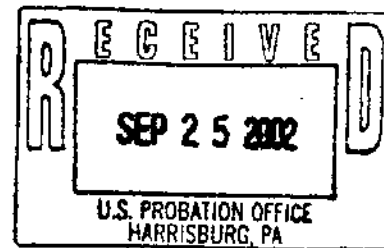
TELEPHONE
717-232-4551

FAX
717-232-2115

September 25, 2002

John K. Vought
U.S. Probation Officer
United States District Court
P.O. Box 805
Harrisburg, PA 17108

RE: USA v. Jeffrey Holland
No. 1:CR-01-195-02



Dear Mr. Vought:

The defendant submits the following in support of his objection to inclusion of the Jason Harrigan homicide as relevant conduct under U.S.S.G. Section 2D1.1(d)(1): No weapons used were ever recovered and no physical evidence linking the defendant to the shooting was found. The jury was unable to reach a verdict on the count charging the defendants with the homicide and the charge was subsequently dismissed upon motion of the United States Attorney.

Police reports compiled during the investigation of the homicide by the Susquehanna Township Police Department disclose the names of individuals other than the charged defendants who had previous disagreements with the decedent Harrigan. A friend of Harrigan by the name of Eugene McDonald stated that Harrigan had a "major problem" with two men named "Nitty" (Frankie Gordon) and "Jabar" (Robert Baylor). Harrigan told McDonald Harrigan had exchanged words with Nitty at Roebucks bar and then it turned into a fistfight. The following day both were again at Roebucks and the fight resumed. Outside the bar, Jabar, a friend of Nitty, pulled a gun and shot Black, a friend of Harrigan's, in the shoulder. After that, a number of shots were fired, according to McDonald. McDonald reported that he thought the grudge was still outstanding at the time of Harrigan's murder.

The reports further disclose that the decedent's girlfriend, cousin and other friends referred to a person by the name of "James" who was believed to be a rival drug dealer on the hill who "had it out" for Harrigan. The identity of "James" was never determined.

John K. Vought
 September 25, 2002
 Page 2

On the evening of the murder, the reports also disclose that a resident of Camelot Village saw an unidentified white man running from the area immediately after the shots were heard. A taxi driver reported that shortly after the time of the homicide, she saw two black males in their early twenties in the vicinity of Camelot Village. They flagged her. She said one of the individuals seemed to be holding something in the front pouch of his sweatshirt. She gave the other individual a ride to a location on Walker Mill Road but not specifically in front of any residence. The cab driver said it was against policy to pick up individuals in this manner and that they made her very nervous. The identity of these individuals was never determined.

The witnesses who implicated the defendant in the homicide testified that the defendant made admissions that he had been involved. With one exception, the witnesses who testified to alleged admissions made by the defendant had extensive criminal backgrounds, were incarcerated at the time of their testimony, and had plea agreements with the government which could substantially reduce their potential sentence in pending prosecutions against them. The one exception, Toyanne Anderson, was the sister of one of the defendants and was involved in transporting and storing drugs for the defendants. She was never charged for her admitted involvement in the activities. She testified at trial that while she was in the back seat of an automobile driven by Shawn Anderson, the defendants admitted killing the decedent, Jason Harrigan, because of "some kind of drug conflict." Anderson had earlier given a statement to Detective James Heilig and S.A. Dan Craft that the killing followed an incident at Roebucks Tavern in Harrisburg. According to Ms. Anderson, Shawn Anderson had approached Harrigan's girlfriend (who was also in the shooting) not knowing that she was with Harrigan and a confrontation occurred. Ms. Anderson said Harrigan got "all up into Shawn's face" and following this episode the defendants followed Harrigan out to Camelot Village and "shot the guy." She testified that in another conversation "they had to pull out on that nigger because he wanted their profits." Statement (4-3-01 page 4). Tanika Bland, the decedent's girlfriend, testified in some detail at trial of the activities of the decedent and herself the evening of the homicide. At no time did she make any reference to Roebucks Tavern or any confrontation with the defendants. If such a confrontation did not occur, it raises a x question as to Toyanne Anderson's accuracy as a witness. If such a confrontation occurred and if it was a motivating factor for the homicide, it raises a question as to whether the killing was drug related at all. It should also be pointed out that in this same statement Ms. Anderson described Shironda Posey as the "mastermind" of the alleged drug business conducted by the defendants. This contention was not supported by any other evidence in the government's case.

Anthony Braxton testified as to an admission allegedly made by Jeffrey Holland regarding the Harrigan homicide. (P.S.R. para. 34). Braxton was charged in the original indictment with Jeffrey Holland, Shironda Posey, Shawn Anderson and Rebekah

John K. Vought
September 25, 2002
Page 3

Christopher. If convicted, Braxton would have qualified as a career offender. In return for his promise of cooperation, he was allowed to plead to a two-count information charging interstate travel in aid of drug trafficking carrying a maximum sentence of ten years. The plea agreement further provided for a potential 5K1.1 departure for substantial assistance.

Shironda Posey testified as to alleged admissions made by Jeffrey Holland. Posey, who was also charged in the original indictment with Jeffrey Holland, was permitted, in return for her cooperation, to plead to a one-count indictment charging the use of a telephone to facilitate a drug offense. This offense carries a four-year maximum penalty. The plea agreement also provided for a downward departure under 5K1.1 for substantial assistance.

Ezerell Bynum, aka Waleed Thomas, testified as to alleged admissions made by the defendant and his co-defendants on an occasion he was in Harrisburg for a "PennDOT issue." Bynum had an extensive criminal record including arson, kidnapping, receiving stolen property and controlled substance convictions. At the time of his testimony, Bynum was awaiting sentence on the charge of uttering fictitious financial instruments. He testified pursuant to a plea agreement providing for a 5K1.1 departure for substantial assistance. He admitted on cross examination that the "PennDOT issue" which brought him to Harrisburg was the procurement of a false identification card under the name of his cousin Waleed Thomas to assist him in avoiding arrest in the event he was stopped for an arrest warrant he knew was outstanding.

Aaron Pitts testified to alleged admissions made by the defendant about the homicide while the two were housed in Dauphin County Prison. (P.S.R. para. 39). Pitts had previously plead guilty pursuant to a plea agreement putting a cap on his potential sentence for distribution of a controlled substance. He would have otherwise been exposed to a sentence as a career offender. The agreement also provided for a 5K1.1 departure for substantial assistance.

Omar Dykes did not testify but was interviewed by investigators regarding alleged admissions he ~~claimed~~ the defendant made while housed at the Dauphin County Prison. At the time of this testimony, Dykes, who had been charged in a drug related homicide, was testifying as part of a plea agreement charging him with 18 U.S.C. 924(j) carrying a ten-year maximum sentence. The agreement also provided for a downward departure for substantial assistance.

It is submitted that in the absence of any eyewitness testimony or physical evidence linking the defendant to the Harrigan homicide, the evidence is insufficient to establish defendant's involvement by a preponderance of the evidence. Each witness who testified as to alleged admissions made by the defendant had something to gain from their testimony and all but Toyanne Anderson had extensive criminal records. Even if testimony from the sources was somehow deemed sufficient to establish defendant's

John K. Vought
September 25, 2002
Page 4

involvement in the killing by a preponderance of the evidence, it must further be established that the killing was carried out in furtherance of the drug conspiracy. If it was done for some personal motive or some other disagreement it would not comprise relevant conduct for purposes of sentencing. It is submitted that there is very little evidence regarding the reason for the homicide. The evidence which was proffered, specifically that of Toyanne Anderson, is not sufficient to establish the homicide as one carried out in furtherance of the drug conspiracy.

Sincerely,

A handwritten signature in black ink, appearing to read 'TJO', with a large, sweeping horizontal stroke extending to the right.

Timothy J. O'Connell

TJO:sf

Harvey Holland #EP8162
S.C.I Dallas

1000 Folliies Road

Dallas, PA. 18612

INMATE MAIL

Office of the Clerk

United States District Court

Middle District of Pennsylvania

U.S. Court house

228 Walnut Street

P.O. Box 983